CASE NO. 82-1554

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CHARLES E. STRICKLAND,
Superintendent
Florida State Prison;
JIM SMITH, Attorney General
of Florida, and LOUIE L. WAINWRIGHT
Secretary, Florida Department
of Corrections,

Petitioners,

vs.

DAVID LEROY WASHINGTON,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for
the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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A. Defendant's Factual Analysis Is Erroneous

The Defendant asserts that the United States District Court found as, "a basic, historical fact" that the Defendant's counsel William Tunkey, "ceased any serious preparation or investigation of [the Defendant's] case approximately one month after being appointed, because he was immobilized by a 'hopeless feeling' upon learning that Mr. Washington had confessed to capital murders. . ." Defendant's brief p. 2. Contrary to the Defendant's analysis, the United States District Court found only, that up until the point of the Defendant's confessions, Bill Tunkey had "actively pursued pretrial motions and discovery" and that even after the confessions, Bill Tunkey advised the Defendant against the entry of guilty

pleas and the Defendant's waiver of a sentencing jury. A264-A265. The Defendant's assertion that the State did not challenge any findings of the United States District Court is also erroneous. Id. at n. 2. The State did file a cross-appeal (JA510) and vigorously contended in both its initial brief and its supplemental brief to the en banc court that there was no basis to find that the Defendant was denied effective assistance of counsel. As reflected in the record, Tunkey did not "cease his preparation" but rather vigorously argued that four statutory aggravating circumstances did not apply; that certain statutory mitigating circumstances did apply and that the Defendant committed the murders while under extreme mental or emotional disturbance. See, JA332-JA336. Furthermore, contrary to the Defendant's bare assertion, Tunkey indicated that in

his pretrial preparation, statutory aggravating and mitigating circumstances were part of the consideration. See JA374-JA377. Thus, the Defendant's attempt to portray his counsel as utterly unprepared is without record support.

To the contrary, the present record clearly reflects that Tunkey made a conscious tactical choice as to his method of presentation and rejected each and every one of the suggested omissions which the Defendant only now proposes. Even the original panel majority below conceded that Tunkey was an active advocate, proceeding with a deliberate course of defense. Washington v. Strickland, 673 F.2d 879, at 900-901 (5th Cir. 1982). The Defendant attacks his counsel now, citing Mr. Tunkey's remarks that he could find every little to address in terms of statutory mitigation. Defendant's brief at p. 8. However, the

Defendant himself even after extensive litigation has yet to produce even a shred of statutory mitigation. As plainly reflected on the record, Tunkey made a clear tactical choice to proceed in the manner in which he proceeded and would not have used the affidavits the Defendant now offers even if they had been available at the time. See, 673 F.2d at 908. The record herein therefore does not establish as the Defendant contends, "a substantial amount of readily available evidence on the critical issue of whether [the Defendant's] would live or die." There has been nothing offered to show that there would have been in any material difference whatsoever in the sentencing proceeding below or the trial court's finding of six statutory aggravating circumstances and no statutory mitigating circumstances. Although the

Defendant claims that the sentencing proceeding below was "fundamentally skewed" he offers no relevant or cogent reason for such a summary allegation. The Defendant's barren claim that Tunkey, failed to do anything at all, "out of despair" is simply not supported by the record. To the contrary, Tunkey, an experienced criminal defense lawyer, testified that based upon his knowledge of the trial judge and the circumstances of the case, he made a deliberate tactical choice to proceed as he did. JA401-JA408; JA429-JA430. The Defendant did not produce any witnesses or evidence below that Tunkey's reasoned strategy with regard to the trial judge, Fuller, was erroneous. Given the circumstances and the trial judge, the Defendant has not shown that another attorney similarly situated would have handled the case differently.

B. The Present Claim of Ineffective Assistance of Counsel Is Properly Examined Under the Due Process Clause Of the Fourteenth Amendment

The Defendant premises his entire presentation to this court upon a theory that the federal courts and this court should get into the business of analyzing every attorney's performance under the Sixth Amendment through detailed supervision of what an attorney did or did not do in each and every case. The Defendant therefore claims that if counsel's acts or omissions, "impaired his defense," that is a sufficient showing for a finding of ineffective assistance of counsel. First of all, the states establish the standards for the admission to the practice of law and regulate and supervise the continuing practice of law. It is also therefore the states that supervise and determine whether or not an attorney is competent.

If a state has formulated a standard for evaluating the competency of counsel, e.g., Knight v. State, 394 So.2d 997 (Fla. 1981) and that standard for competent counsel does not fall below any fundamental constitutional minimum under the Fourteenth Amendment, any federal court inquiry should go no further than to determine that it was fairly applied. Cf, Wainwright v. Goode, ____ U.S.____, 34 Crim.L.Rep. 4101 (1983). This court should not therefore under the guise of the Sixth Amendment engage in detailed supervision of the competency of counsel.

Secondly, the Defendant's ad hoc "I-know-it-when-I-see-it" approach to a standard for ineffective assistance of counsel claims leaves the finality of judgments to the whim of a purely subjective standard and the trial-lawyer experience or lack thereof of any particular court. Compare, King v. Strickland, 714

F.2d 1481 (11th Cir. 1982); Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983). In Spraggins, defense counsel in the face of overwhelming evidence attempted to save the defendant from the death penalty by maintaining, "his credibility before the jury" and arguing to the jury during his closing argument that they should be merciful to the defendant. Defense counsel did not ignore any defenses nor was he unaware that the death sentencing proceeding would follow the trial. Conceding that an argument of innocence would have been "somewhat hypocritical" in the face of overwhelming evidence, the Spraggins court nevertheless citing Washington v. Strickland, imposed its subjective view of the proper tactical choice and found that counsel was ineffective in his closing argument and that counsel's ineffectiveness caused actual prejudice

to the defendant. Id at 1194-1195. Similarly, in King, the court labored through a detailed analysis of the defendant's claim that his attorney was ineffective at trial and rejected that claim. However, as to the penalty phase, citing Washington v. Strickland, the court found that counsel was ineffective because of what the court subjectively considered was a "weak" closing argument and because counsel failed to present all available character witnesses. Defense counsel in King did call other witnesses in mitigation, but the King court seemed to subjectively fault counsel for being ineffective because he didn't call every witness that the defendant had suggested irrespective as to the actual effect of such an omission. 714 F.2d at 1490-1491. The King court's analysis of defense counsel's closing argument also centers upon perhaps what a better attorney might

have done under the same circumstances, rather than in terms of fundamental constitutional error under the Fourteenth Amendment. Id. at 1491. It is apparent in King and Spraggins that the Court below under the guise of the Sixth Amendment and the present decision has improperly opened constitutional analysis to an entire array of subjective second-guessing. Cf., Hamlin v. United States, 418 U.S. 87 (1974)(pornography).

The same error in the Defendant's analysis is contained at pages 59-60 of the Defendant's brief. The Defendant argues that the en banc court erred in adopting this court's standard in United States v. Frady, 456 U.S. 152 (1982), because the analysis by this court in Frady is, "foreign to--indeed, in conflict with-- basic Sixth Amendment principles." The Defendant also contends that neither Frady nor Engle are relevant

herein because they involve a presumption of competent counsel and the "cause and prejudice" analysis under Wainwright v. Sykes, 433 U.S. 72 (1977). First of all, this court in Engle and Frady made no presumption that counsel was competent. Secondly, in Engle, the court placed no narrow limit upon the scope of its analysis of ineffective assistance of counsel claims. The Court instead observed that the writ of habeas corpus is, "a bulwark against convictions that violate 'fundamental fairness,'" [Emphasis added]. 102 S.Ct. at 1570. The court also noted that the writ, "entails significant costs." Id. at 1571. Reviewing Wainwright v. Sykes, 433 U.S. 72, at 97 (1977) the Court therefore refused to limit Sykes "cause" and actual prejudice standards to cases in which the constitutional error has not affected the truth finding function of a trial. 102 S.Ct.

at 1572. Compare also, Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgements," 38 U.Chi.L.Rev. 142 (1970). In both Frady and Engle as directly applicable herein the Court clearly expanded its analysis to set broad constitutional limits upon claims of ineffective assistance of counsel and the present use and abuse of the great writ.

The Defendant's efforts to resurrect the original panel opinion below through a proposed standard that counsel's actions or inactions "impaired his defense"[1] is an attempt to impose upon this case a standard reserved for those cases wherein this court has made a policy decision that error is presumptively harmful in circumstances tantamount to no counsel at all or where

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[1]This "standard" was not preserved below. The Defendant neither filed a motion for rehearing of the decisions below nor a cross-petition for certiorari in the present case.

counsel was prevented from discharging critical function or in a circumstance wherein counsel has an actual conflict of interest. See, e.g., Cuyler v. Sullivan, 446 U.S. 335 (1980); Herring v. New York, 422 U.S. 853 (1975); Geders v. United States, 425 U.S. 80 (1970); Powell v. Alabama, 297 U.S. 45 (1932). However, even the panel majority below recognized that the present circumstance is clearly distinguished from one in which any error is presumptively harmful as in the Sixth Amendment cases or in those cases wherein the denial of due process and a fair trial is tantamount to no counsel at all. 673 F.2d at 900-901; see Holloway v. Arkansas, 435 U.S. 475 (1978); Davis v. Alaska, 415 U.S. 308 (1974)(confrontation clause); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 at 54 (1961)(right to counsel).

Under the State's standard, first, any defendant has the burden to properly

plead his claim against his counsel, by reciting appropriate details rather than mere conclusions. Secondly, a defendant has the burden to show that his counsel's act or omission was measurably below that of competent counsel. This should not be shown by reference to ideal lists of what counsel should do[2]. Subsumed in this second requirement is the procedural default analysis under Wainwright v. Sykes. Unless a defendant can transcend the cause and prejudice requirement as articulated in Sykes and Engle, he cannot carry his burden under the second part of the analysis suggested by the State. Thirdly, a defendant has the burden to show in the context of his particular

[2]It is interesting to note that the Defendant apparently agrees with the State in this regard in his effort to criticized the en banc court and its labyrinth of claims against counsel based upon the "duty" to investigate. Defendant's Brief at pp. 43-44.

case that there is a substantial likelihood that his counsel's act or omission affected the outcome of the case. The State would emphasize here that a defendant need only show a likelihood, not that the claim did affect the outcome of the case. Fourth, the State may in fact show by proof beyond a reasonable doubt that there was no prejudice in fact.

This proposed standard is completely consistent with the decisions of this court including Engle and Frady, which place the burden of proof in collateral proceedings entirely upon a defendant, e.g., Frady, 102 S.Ct. at 1572, 1596; Henderson v. Kibbe, 431 U.S. 145, at 154-155 (1977); United States ex rel. Darcy v. Handy, 351 U.S. 454 at 463 and focus upon a likelihood that the outcome would have been different, see, Smith v. Phillips, __ U.S.__, 102 S.Ct. 940

(1982); United States v. Valenzuela-Bernal, __U.S.____, 102 S.Ct. 3440 (1982); United States v. Agurs, 427 U.S. 97 (1976); Chambers v. Maroney, 399 U.S. 42 (1970); Comment, "'Fundamental Miscarriage of Justice': The Supreme Court's Version of the 'Truly Needy' in Section 2254 Habeas Corpus Proceedings" 20 San Diego Law.Rev. 371, at 374 (1983). Even in McMann v. Richardson, 397 U.S. 759 at 772 (1970), the Court said that a defendant must demonstrate and carry the burden to show, "gross error" upon the part of his counsel.

Furthermore as noted, Frady and Engle demonstrate that constitutional analysis of the present claim must be under the limited Fourteenth Amendment guarantee of due process and fundamental fairness. e.g., Ingraham v. Wright, 430 U.S. 651, at 675 (1977); Donnelly v. DeChristoforo, 416 U.S. 637, at 642

(1974). Additionally, since a defendant cannot logically be said to have been treated unfairly by something which did not affect him, the requirement of harm and actual prejudice is inherent in the concept of due process and fundamental fairness. See Beck v. Washington, 369 U.S. 541 (1962); Donnelly v. DeChristoforo, Henderson v. Kibbe, supra; Cupp v. McNaughten, 414 U.S. 141 (1973); see also, United States v. Lovasco, 431 U.S. 783, 789-790 (1977)(pre-indictment delay); United States v. Agurs, 427 U.S. 97 (1976). United States v. Marion, 404 U.S. 307, at 325-326 (1971). Unlike the State's analysis the Defendant's "impairment-of-defense" standard does not involve any fundamental fairness/due process analysis or require proof of actual prejudice and should therefore be summarily rejected.

C. Judge Fuller's Testimony Erroneously Excluded

At page 102 of his brief, the Defendant claims, "petitioners are unable to point to any case-state or federal-that has upheld the admissibility of a state judge's subjective processes." In the present case there is no inquiry into the "subjective processes" of Judge Fuller at the time he entered his sentence. Rather, consistent with Agurs, and its progeny, Judge Fuller was permitted to explain as he would in any proceeding under Agurs the effect if any of any "new evidence" upon the outcome of a previous proceeding. In any event, contrary to the Defendant's statement, for example, in Hampton v. Wyrick, 588 F.2d 632 (8th Cir. 1978), a state judge was permitted to testify as to the subjective basis for a sentence. Additionally, this court's decision in Gardner v. Florida, 430 U.S.

849 (1977), contemplates that a state sentencing judge must disclose his mental processes and "impeach" his sentence if he considered improper evidence. This court should consider also that judges are different than jurors. They are presumed to follow the law and they have an ability to follow the law. Moreover, it is absurd to suggest that had Judge Fuller said that he would not have imposed the death penalty based upon any new evidence submitted, that a federal judge or any court should ignore that declaration[3].

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[3]The analogy could be drawn herein to Rule 803 (24) of the Federal Rules of Evidence wherein hearsay is excluded except when it is, "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. . ." Certainly in the present case the statement of the sentencing judge as to the effect of new evidence is, as stated in

The present ruling below should therefore be reversed.

RESPECTFULLY SUBMITTED, on this____ day of January, 1984, at Tallahassee, Leon County, Florida.

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Rule 803, "more probative "of the issue of whether the death sentence should stand than any other evidence procured by either party. See also, United States v. Tucker, 404 U.S. 443, at 542 (1972) (the Chief Justice and Blackmun, J. dissenting).